

February 16, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Scott A. Hodes

Date of Filing: March 29, 2005

Case Number: TFA-0096

On March 29, 2005, Scott A. Hodes (the Appellant) filed an Appeal from a second and final determination issued by the Department of Energy's (DOE) Freedom of Information Act/Privacy Act Group (FOI/PA). In that determination, the FOI/PA responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. The FOI/PA released portions of responsive documents, but withheld other portions of the documents under FOIA Exemption 4. This Appeal, if granted, would require the FOI/PA to release those portions of the documents to the Appellant.

I. Background

On August 11, 2004, the Appellant filed a request for information with the FOI/PA seeking "all studies maintained by your agency concerning the use of Gulf Stream Currents for Ocean Wave Energy applications." Request Letter dated August 11, 2004, from Scott A. Hodes to FOIA Officer, DOE. On March 16, 2005, the FOI/PA responded to the request with a final determination. Determination Letter dated March 16, 2005, from Abel Lopez, Director, FOI/PA, to Appellant. In its March 16, 2005 Determination Letter, the FOI/PA withheld portions of documents concerning two grants, awarded under the Small Business Innovation Research (SBIR) grant program, under Exemption 4, concluding that release of the withheld information would cause the submitter competitive harm. The FOI/PA withheld the information because it was submitted to the DOE with the understanding that it would remain confidential for four years after acceptance of all items to be delivered under the grant. The government agreed to use the data only for its own purposes. The government had further agreed, in accordance with the U.S. Small Business Administration's SBIR Program Policy Directive of 2002, that the information would not be disclosed outside of the government. March 16, 2005 Determination Letter at 2. The FOI/PA indicated that the information it withheld under Exemption 4 would disclose the submitter's organizational structure and its approach to analyzing and responding to various requirements under the grant, including mechanical, electronic, personnel and

documentary requirements. *Id.* FOI/PA further stated that such information would give competitors a clear competitive advantage in future competitions, and release of the information would cause substantial competitive harm to the submitters. *Id.* On March 29, 2005, Mr. Hodes filed an Appeal responding to the FOI/PA's determination. Appeal Letter dated March 22, 2005, from Scott A. Hodes to Director, Office of Hearings and Appeals (OHA), DOE.

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only Exemption 4 is at issue in the present case.

A. Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*). If the material does not constitute a trade secret, the agency must engage in a more complex analysis, as set forth in *National Parks*.

Under *National Parks*, the first requirement for Exemption 4 protection is that the withheld information must be "commercial or financial." Courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing *Washington Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982)). Second, the information must be "obtained from a person." "Person" refers to a

wide range of entities, including corporate entities. *Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979).

In order to determine whether the information is "confidential," the agency must first decide whether the information was either voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879. For this information to be found to be "confidential," it must meet one of two tests: its release would either impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the submitter. *National Parks*, 498 F.2d at 770. In this case, the submitters presented the requested information to the DOE on an involuntary basis, because it was required by the grant program. Release of this information is not likely to impair the government's ability to obtain necessary information of this type in the future because, as stated above, it is required to be submitted under the grant program. Consequently, the sole test for establishing confidentiality of the submitted information in this case is whether its release will substantially harm the submitter's competitive position.

Using the "competitive harm" prong of the *National Parks* test, the FOI/PA withheld the redacted information. March 16, 2005 Determination Letter at 2. The FOI/PA alleges that release of the withheld information is likely to cause substantial competitive harm to the submitter. *Id.* at 3. The FOI/PA goes on to state that if the information were released, a competitor would have a clear advantage in future competitions and the method used to respond to solicitations. *Id.* We agree. We have reviewed the information which was redacted. The information concerns two grants, awarded under the SBIR grant program. The information is of a technical nature that appears to be unique to the submitter in the way it was collected and presented in its proposal. Release of the information withheld by the FOI/PA would result in competitive harm to the submitter.

B. Public Interest in Disclosure

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. However, in cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would

constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See, e.g., Martin Becker, Case No. VFA-0710, 28 DOE ¶ 80,222 (2002)*. Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4.

C. Other Matters Raised on Appeal

Finally, we note that the Appellant requested information about the Coriolis program and stated in his Appeal that no mention was made of this portion of his request in the March 16, 2005 Determination Letter. On May 18, 2005, FOI/PA transferred this portion of his request to the Golden Field Office to determine if any documents responsive to his request exist there. Letter dated May 18, 2005, from Abel Lopez, Director, FOIA/Privacy Act Group, DOE, to Appellant. The Golden Field Office will respond to the Appellant directly. Secondly, in the Appeal, the Appellant requests copies of the statements and justifications offered by the grant recipients. This constitutes a new request in that the information now sought lies beyond the scope of the Appellant's original request. The Appellant must file a new request for this information. Consequently, we will not consider this aspect of the Appeal.

III. Conclusion

Because the FOI/PA has met its burden of showing that it properly withheld the information under Exemption 4, we are denying the Appeal.

It Is Therefore Ordered That:

- (1) The Appeal filed by Scott A. Hodes, Case No. TFA-0096, is hereby denied.
- (2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 16, 2006